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Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

ZEKE LAYMAN

Petitioner

vs.

INTERNAL REVENUE SERVICE OF THE UNITED STATES OF AMERICA

Respondent

and

DEPARTMENT OF TREASURY

Respondent

SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

ZEKE LAYMAN
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In Properia Persona

14 pp

Sup. App. 1
OPINION BELOW

FILED
Dec 21 4 12 pm'99

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA

ZEKE LAYMAN, Plaintiff,	)	CV-F 99-5239 SMS
	)	ORDER GRANTING THE
v.	)	UNITED STATES' CROSS-
	)	MOTION FOR SUMMARY
UNITED STATES OF AMERICA et al., Defendants	)	JUDGMENT, AND DENYING LAYMAN'S MOTION FOR SUMMARY JUDGMENT

The above entitled motions came on regularly for hearing on Thursday, Nov. 4, 1999, at Courtroom 4 before the Hon. Sandra M. Snyder, United States Magistrate Judge. Todd Peterson, Esq., appeared on behalf of plaintiff Zeke Layman: Catherine Cerna, Assistant U.S. Attorney, appeared on behalf of defendant United States of America.

Layman filed a complaint at Inyo County Superior Court on Jan. 11, 1999, to quiet title regarding federal tax liens recorded on the property. The United States removed the action to this court on March 4, 1999. Layman filed his motion for summary judgement on Aug. 25, 1999. The United States filed opposition and a cross-motion for summary judgment

on Oct. 5, 1999. Layman filed a reply on Nov. 1, 1999. Following oral argument, the court granted Layman's request to file further briefing. Accordingly, Layman filed a response on Nov. 15, 1999. The United States filed a reply on Nov. 22, 1999.

DISCUSSION:

"A motion for summary judgment provides a procedure for terminating without trial actions in which 'there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.'" Schwarzer, Tashima & Wagstaffe, Fed. Civ. Proc. Before Trial ¶ 14:4 (1998) (emphasis omitted), Citing Fed. R. Civ. P. 56©). "[I]t is the moving party's burden to establish that there is 'no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.'" Id. ¶ 14:123. "'When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings. . . (T)he adverse party's response . . . must set forth specific fact showing that there is a genuine issue for trial.'" Id. ¶ 14:142 (cite omitted).

1. Layman's Motion for Summary Judgment

On Nov. 23, 1987, Irwin and Darlene Ruth Koff transferred their interest in the subject property to plaintiff Layman for consideration of $40.00 in silver.[1]

P&A 4:2-4. On Feb. 27, 1990, and on April 2, 1990, the IRS recorded liens for delinquent taxes resulting from the Koffs' failure to file income tax returns for the tax years 1982-1985. The liens were refiled on Sept. 11, 1995. Layman contends the government liens cannot attach where the property already has been transferred, even if unrecorded. The Koffs' transfer to layman was not recorded until March 30, 1992.

Although conceding the IRS "is entitled to a lien on real property for unpaid taxed", Layman contends that insofar as the property was transferred to him PRIOR to the recording of the lien, Layman has a superior interest in the property, citing Casey v. Gray, 13 C.A. 4th 611, 16 C.R.2d 583 (1993). In Casey, real property was transferred but not recorded, a money judgment was recorded against the original owner, and then the property transfer was finally recorded. The court held the money judgment, despite being recorded first, did not affect the prior transfer. Layman's

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Although Layman refers to the Koffs as his parents in his P&As, 3:15-16, in a Statement dated Aug. 21, 1997, filed with a Collection Appeal Request, Layman indicates that he "met the Koff's [sic] in June of 1987 . . . ." See Kinkade Decl. Exh. F. Layman has not filed a reply addressing this factual discrepancy. This was not clarified at hearing, his counsel claiming ignorance at the Court's inquiry.

motion for summary judgment only addressed his first cause of action to quiet title.

The United States contends, in its cross-motion for summary judgment, that nevertheless the United States' tax lien is superior to Layman's unrecorded-transfer.

2. The United States' Cross-Motion For Summary Judgment

A. Quiet Title

i. Fraudulent Transfer

Notwithstanding the United States' argument as to the statute of limitations,

> if [the taxpayers] lawfully granted all of [their] interest in the property to plaintiff before the [tax liens] were recorded, then no liens would attach. "'The law is well settled that the lien of a judgment does not attach to a naked title, but only to the judgment debtor's interest in the real estate; and if he has no interest, though possessing the naked title, then no lien attaches. Thus a creditor who attaches property for his debt obtains a lien only upon the title or interest which the debtor has in the property at the time of the levy, and if at that time all title and interest has [sic] passed from him to a third person, the

creditor gets nothing by the levy.'"

Barisich v. Lewis, 226 C.A. 3d 12, 19, 275 C.R. 331, 335 (1990) (italic bracket in the original, citations omitted).

The United States, however, contends the above transfer was fraudulent, citing to Cal. Civil Code § 3439.04, which reads:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

The United States points to several factors here, supported by case law cited in their brief that are indicuas of fraudulent intent, to wit: the transaction

was concealed as reflected by the deed not being recorded for four and one half years, Irwin Koff recommended to Layman that he not file the deed, the Koffs transferred the property in anticipation of IRS claims, the transfer was for inadequate consideration ($40.00 versus the 1990 appraised value of $83,000), and this property transaction was part of a series of transactions that divested the Koffs of all their assets except for Irwin Koff's pension. The United States points to discrepancy of wether or not Layman is the Koffs' son and, regarding Layman's contention that the property was an early inheritance, note Layman has never declared the property on his own tax returns pursuant to Internal Revenue Code § 2503(b) (1).

In the United States' cross-motion for summary judgment, the United States distinguishes plaintiff's cited case Casey, regarding the superiority of a transfer deed predating a lien but recorded after the lien. Casey involved a judgment that was recorded after the debtor had transferred ownership interest of the property at issue. Casey would otherwise support Layman if Layman was a purchaser "in good faith" and acquired the property "for a valuable consideration". Cal. Civ. Code § 1107. Layman appears to have been neither.

Counsel for Layman appeared to be learning of the background facts here for the first time upon the United States' cross-motion for summary judgment. In his reply filed Nov. 1, 1999, he requests both motions be denied without prejudice so that he can continue with his discovery. See Fed. R. Civ. P. 56 (f). However, counsel for Layman did not "state what facts are sought[,] and show how these are reasonably

expected to create a triable issue." Schwarzer, Tashima & Wagstaffe, Fed. Civ. Proc. Before Trial ¶ 14:114.2 (1999). The Court notes that much of the facts set forth by the United States are within knowledge of Layman, and Layman did not provide any further declarations.

Nevertheless, the Court did provide Layman an opportunity to file further briefs. Again, Layman did not file any further declarations explaining or disputing facts as set forth by the United States. Following further oral argument, counsel for Layman submitted the matter on the pleadings, which the Court construes as withdrawing any possible Rule 56(f) request.

Based upon the above mentioned facts, the Court does find the transfer to have been fraudulent. Specifically, the Court finds the consideration paid for the property, $40.00, to be only nominal consideration, and that the property transfer from the Koffs to Layman was with knowledge that an assessment of unpaid taxes was quickly forthcoming. Accordingly, the Court GRANTS the United States' cross-motion and DENIES plaintiff's motion for summary judgment on this basis.

ii. Statute of Limitations

> As a sovereign, the United States is immune from suit without its consent, and the terms of its consent when granted define and circumscribe our jurisdiction. "The applicable statute of limitations is a term of consent. The failure to sue the United

States within the period of limitations is not simply a waivable defense; it deprives the district court of jurisdiction to entertain the action. Moreover, because such statutes function as a jurisdictional conditions, they must be strictly construed."

* * *

28 U.S.C. § 2401 (a) is the catchall statute of limitations provision. It says in relevant part that ". . . every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." . . .

. . . [L]awsuits brought against the United States under § 2410 (a) to quiet title are subject to the statute of limitations found in § 2401 (a).

. . . " A federal tax lien attaches to a taxpayer's property when unpaid taxes are assessed . . . ."

Nesovic v. United States, 71 F. 3d 776, 777-78 (9th Cir. 1995), cites omitted.

In the present action, taxes were assessed on Oct. 30, 1989. The United States correctly notes that in the alternative, the action would nevertheless still be barred based upon the either the dates the liens were recorded (April 16, 1990) or the date that Layman had actual knowledge of the liens (1992). Accordingly, the Court fines the action to quiet title to be barred by the applicable statute of limitations.

B. Slander of Title

Layman's second cause of action is for slander of title. Layman seeks monetary damages for this claim. "Slander of title is a false and unprivileged disparagement , oral or written, of the title to real or personal property, resulting in actual pecuniary damage." 5 Witkin, Summary of California Law, Torts § 569 (9th ed. 1988). The elements of the claim are "publication, falsity, absence of privilege, and disparagement of another's land which is relied upon by a third party and which results in pecuniary loss." Id. "[A]ctual malice or ill will is unnecessary." Id. (emphasis omitted).

The Court has found no authority supporting a plausible claim for slander of title, even construing the facts generously in favor of plaintiff. See, i.e., Erickson v. Luke, 878 F. Supp. 1364 (D. Idaho 1995) (slander of title claim rejected). Insofar as the Court has found, supra, that the transfer of title from the Koffs was fraudulent and has further found the action to quiet title to be barred under the statute of limitations, the Court accordingly finds the publication through the filing of the lien to be not false.

The United States, in its cross-motion for summary judgment, further notes Layman has not exhausted his administrative remedies regarding the slander of title claim. Layman did not address this argument directly in his response filed Nov. 1, 1999, instead suggesting he be granted leave pursuant to Rule 56(f) to conduct further discovery. At the first hearing, however, the Court granted Layman's request for an

opportunity to file further briefing. Layman did so on Nov. 15, 1999, which made only a feeble and ineffective gesture at addressing the United States' argument. Layman did not address any of the United States' Statement of Undisputed Facts in either his initial or subsequent response to the United States' cross-motion for summary judgment. Accordingly, the Courts finds no grounds for not granting the government's cross-motion for summary judgment.

CONCLUSION:

Plaintiff's motion for summary judgment is hereby DENIED, and the United States' cross-motion for summary judgment is hereby GRANTED. The Clerk of the Court is directed to enter judgment in favor of the United States.

Dated: Dec. 21, 1999

SANDRA M. SNYDER,
United States Magistrate Judge

Sup. App. 11
OPINION BELOW

FILED
Jan 22 2:53 pm 2001

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ZEKE LAYMAN, Plaintiff,	)	CV-F 99-5239 SMS
	)	ORDER DENYING
v.	)	MOTION TO SET ASIDE
	)	ORDER OR
INTERNAL	)	RECONSIDERATION
REVENUE	)	
SERVICE	)	(Doc. No. 36)
Defendants	)	

On Friday, Jan. 19, 2001, the above entitled action was regularly called on the court calendar at Courtroom 4, the Hon. Sandra M. Snyder, presiding. Plaintiff Zeke Layman appeared representing himself; Catherine Cerna, Assistant U.S. Attorney, appeared representing the defendant.

Layman filed the instant motion to set aside order or reconsideration on Dec. 14, 2000. Defendant filed opposition on Dec. 28, 2000. Layman filed an objection, a reply to opposition, and an affidavit on Jan. 16, 2001.

Layman's motion stems from this Court's Order denying Layman's motion for summary judgment and granting defendant's Cross-motion for summary

judgment. In sum, the Court found Layman had not met his burden in his motion for summary judgment and had failed to rebut the arguments set forth by defendant in defendant's cross-motion for summary judgment. That ruling was issued Dec. 21, 1999.

Layman brings the instant motion pursuant to Fed. R. Civ. Proc. 60 (b), which reads in part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . . The motion shall be made within a reasonable time, and . . . not more than one year after judgment, order, or proceeding was entered or taken.

Layman does not state under which subsection of Rule 60 (b) he brings the instant motion.

Layman first contends this Court, as an "Untied [sic] States Magistrate Judge", had no jurisdiction to rule on the motions for summary judgment. Layman is in error. While Layman's then attorney may not have fully discussed the ramifications of consenting to magistrate judge jurisdiction with his client, both

Layman's attorney and defendant consented to magistrate judge jurisdiction on June 30, 1999. This Court accordingly had jurisdiction to rule on the motions for summary judgment pursuant to 28 U.S.C. § 636 (c) . See Link v. Wabash R. R. , 370 U.S. 626, 633-34, 82 S. Ct. 1386, 1390 [8 L.Ed.2d 734] (1962) (Acts of attorney binding upon client).

The Court has reviewed its order to the motions for summary judgment and stands by its reasoning and legal analysis. Layman has not set forth any new facts which would justify a motion under Rule 60 (b). Layman is not entitled to a trial where the respective motions for summary judgment revealed that there were no disputed material facts. Further, as properly set forth by defendant, even if there were disputed material facts, Layman would only have been entitled to a bench trial, not a jury trial, pursuant to 28 U.S. C. § 2409a (f). For these reasons, Layman's motion is hereby DENIED.

DATED: 1 /22 /01

SANDRA M. SNYDER
United States Magistrate Judge